Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
LEVEL 3 COMMUNICATIONS LLC	)	
	)	
Petition for Forbearance Under	)	WC Docket No. 03-266
47 U.S.C. §160(c) from Enforcement	)	
of 47 U.S.C. § 251(g), Rule 51.701(b)(1),	)	
and Rule 69.5(b)	)	

REPLY COMMENTS OF SBC COMMUNICATIONS INC.

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I. INTRODUCTION AND SUMMARY

SBC submits the following reply comments in opposition to Level 3's forbearance petition[1] in order to emphasize four key points:

First, contrary to the claims of some commenters, under the Commission's rules the payment of reciprocal compensation does not represent the "*status quo*" compensation regime for IP-PSTN traffic.[2] Rather, the Commission's long-standing access charge rules require the payment of access charges when incumbent local exchange carrier (ILEC) facilities are used to originate or terminate circuit-switched telephone calls, which is precisely what occurs on the PSTN side of an IP-PSTN call.

Second, notwithstanding some commenters' perfunctory support for Level 3's forbearance request, Level 3 has completely failed to satisfy any -- let alone all three -- of the statutory criteria for forbearance.

Third, while commenters may disagree over the merits of Level 3's petition, the record shows significant agreement that: (a) IP-PSTN services are interstate services subject to the Commission's exclusive jurisdiction, and (b) the Commission should proceed expeditiously with holistic intercarrier compensation reform as proposed in the *Intercarrier NPRM*.[3]

Fourth, although SBC opposes Level 3's forbearance petition, we continue to believe that the IP-based services described by Level 3 are, in fact, interstate information services that should not be subjected to unnecessary legacy common carrier regulation.

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[1] Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. §160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b), WC Docket No. 03-266 (Dec. 23, 2003) (Level 3 Petition).

[2] In these reply comments, SBC uses the term IP-PSTN to collectively describe traffic that originates in the Internet Protocol (IP) and terminates on the public switched telephone network (PSTN) as well as traffic that originates on the PSTN and terminates in IP, unless otherwise noted. *See* Level 3 Petition at 1 (referring to IP-PSTN traffic and PSTN-IP traffic collectively as IP-PSTN traffic).

[3] *See Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001) (*Intercarrier NRPM*).

II. DISCUSSION

A. Access Charges Apply to IP-PSTN Voice Traffic Under Existing Commission Rules.

Some of the commenters supporting Level 3's petition erroneously assert that IP-PSTN traffic is exempt from access charges today.[4] They claim that the Commission should grant Level 3's petition in order to preserve the "*status quo*," which in their view is reciprocal compensation, not access charges.[5] To support their assertions, the commenters rely primarily on two theories: (1) the enhanced service provider (ESP) exemption precludes the application of access charges to the PSTN side of an IP-PSTN call,[6] and (2) the *Report to Congress*[7] expressly exempted IP-PSTN traffic from access charges.[8]

As discussed below, however, these commenters have grossly overstated both the scope of the ESP exemption and the significance of the *Report to Congress*, neither of which provides the sweeping exceptions to the Commission's access charge regime that the commenters claim. To the contrary, for more than two decades the Commission's access charge regime has required the payment of access charges whenever local exchange switching facilities are used to originate or terminate a circuit-switched telephone call -- which is exactly what happens on the PSTN side of an IP-PSTN call. And nothing in the ESP exemption or the *Report to Congress* was ever intended to change this result. Indeed, just 3 weeks ago, the Commission reiterated its belief that

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[4] AT&T Comments at 10-18; CompTel/Ascent Alliance at 2-7; Global Crossing Comments at 7-10; ICG Comments at 2-6; MCI Comments at 3-5; USA Datanet Comments at 3-6.

[5] AT&T Comments at 18; CompTel/Ascent Alliance at 2-3; USA Datanet Comments at 6-7.

[6] Global Crossing Comments at 8; ICG Comments at 4-5; MCI Comments at 3-4. For convenience, SBC generally uses the terms enhanced service provider (ESP) and information service provider (ISP) interchangeably (though consistent with the Commission's definitions of these terms) throughout these comments.

[7] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501 (1998) (*Report to Congress*).

[8] AT&T Comments at 12-13, 17; ICG Comments at 2-3; USA Datanet Comments at 4-5.

"*any* service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways."[9] Thus, far from maintaining the *status quo*, Level 3 and its supporters are asking the Commission to radically alter the access charge rules, which would give them an unfair and inequitable advantage over other competitors. The Commission should reject this imprudent request and should instead proceed with holistic intercarrier compensation reform in the *Intercarrier NPRM*.

1. IP-PSTN Voice Service Providers Use Access Services and Are Required to Pay Access Charges, Unless an Express Exemption Applies or Until the Commission Changes its Rules.

In 1983, the Commission adopted a comprehensive plan for prescribing the fees, known as "access charges," that parties would pay to local telephone companies for using their facilities.[10] The Commission quickly realized, however, that the terms used in its rules may have raised some questions about how those rules should be applied. Specifically, the Commission observed that its rules often describe access charges in terms of their application to "interexchange carriers," thus potentially causing "some uncertainty as to whether these rules would apply to entities which may not be considered carriers, such as enhanced service providers . . . ."[11]

But the Commission pointed out that ESP's do, in fact, use access services: "Among the variety of users of access services are facilities-based carriers, resellers (who use facilities provided by others), sharers, privately owned systems, *enhanced service providers*, and other

[9] *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28 ¶ 33 (released March 10, 2004) (*IP-Enabled Services NPRM*) (emphasis added).

[10] *MTS and WATS Market Structure*, CC Docket No. 78-72, Third Report and Order, 93 FCC 2d 241 (1983). *See also MTS and WATS Market Structure*, CC Docket No. 78-72, Memorandum Opinion and Order, 97 FCC 2d 682 (1983) (*MTS/WATS Market Structure Order*).

[11] *MTS/WATS Market Structure Order* ¶ 76.

private line and WATS customers, large and small . . . ."[12] According to the Commission, ESPs, like IXCs, typically "obtain[] local exchange services or facilities which are used, in part or in whole, for the purpose of completing interstate calls which transit [the ESP's] location" and which the ESP then "connects . . . to another service or facility over which the call is carried out of state."[13] Thus, to remove any potential uncertainty in its rules, the Commission plainly stated that "[o]ur intent was to apply these carrier's carrier charges to interexchange carriers, and to all resellers and *enhanced service providers* . . . ."[14]

Nothing in the last twenty years suggests that the Commission has changed its understanding that ESPs are, in fact, users of access services who must pay access charges for those services unless specifically exempted from doing so. Indeed, Congress codified the obligation of LECs to continue providing access services to ESPs when it added section 251(g) to the Communications Act in 1996. Section 251(g) states that LECs "shall provide exchange access, information access, and exchange services for such access to interexchange carriers and *information service providers*" in the same manner as they had done prior to the 1996 Act, "*including receipt of compensation*" for those access services.[15]

Despite the plain language of section 251(g), however, AT&T argues that no LEC could lawfully impose access charges for IP-PSTN traffic today because section 251(g) only preserves those rules that were in effect at the time of the 1996 Act and, AT&T asserts, there were no rules governing the compensation regime for IP-PSTN traffic when the Act was passed.[16] According to AT&T, if 251(g) is inapplicable, IP-PSTN traffic is necessarily subject to reciprocal

[12] *MTS/WATS Market Structure Order* ¶ 78 (emphasis added).

[13] *MTS/WATS Market Structure Order* ¶ 78.

[14] *MTS/WATS Market Structure Order* ¶ 76 (emphasis added).

[15] 47 U.S.C. § 251(g) (emphasis added).

[16] AT&T Comments at 10-13.

compensation under section 251(b)(5).[17] AT&T bases this argument on the D.C. Circuit's decision in *WorldCom v. FCC*, where the court held that section 251(g) did not exempt ISP-bound traffic from section 251(b)(5) because it found that there were no rules governing the intercarrier compensation for that traffic when the 1996 Act was enacted.[18]

But AT&T's reliance on *WorldCom* is misplaced. Regardless of whether there were rules governing intercarrier compensation for ISP-bound traffic in place prior to 1996, there clearly *were* rules governing the payment of access charges for PSTN-originated and PSTN-terminated interexchange traffic.[19] Indeed, those rules have been in place since 1983. Thus, contrary to the claims of AT&T and other commenters, the true *status quo* under the Commission's *existing rules* is that access charges apply to IP-PSTN voice services, unless an exception applies or until the Commission changes those rules in the future.[20]

2. The ESP Exemption Does Not Apply to the PSTN Side of an IP-PSTN Call.

Some commenters claim that Level 3 and other IP-PSTN service providers are not required to pay access charges when they send traffic to (or receive traffic from) the PSTN because they are excused from doing so under the Commission's so-called ESP exemption.[21] But other than offering brief, generalized restatements of the ESP exemption and its history, these commenters make no effort to explain why or how the ESP exemption would actually apply in the context of IP-PSTN traffic. They simply claim that, under the ESP exemption, ESPs "are exempt from the imposition of access charges by LECs."[22]

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[17] 47 U.S.C. § 251(b)(5) (describing LEC duties to establish reciprocal compensation arrangements).

[18] AT&T Comments at 12 (citing *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002)).

[19] 47 C.F.R. § 69.5(b).

[20] *See* SBC Opposition at 10-13.

[21] Global Crossing Comments at 8; ICG Comments at 4-5; MCI Comments at 3-4.

[22] *See* Global Crossing Comments at 8.

Such overbroad characterizations of the ESP exemption grossly exaggerate the scope of that exemption. As SBC explained at length in its comments, the ESP exemption is not -- and was never intended to be -- a complete exemption from all access charges on all calls passing through an ESP to or from the PSTN.[23] Instead, the ESP exemption was designed as a limited carve-out from access charges in order to jump start what was then a fledgling ESP industry.[24] Under the exemption, an ESP is treated as an end user and is not required to pay access charges when it uses a LEC's facilities to provide a link *between itself and its own customers*. As the Commission itself has stated, the ESP exemption excuses ESPs from paying access charges when they "use incumbent LEC networks to receive calls from their customers."[25] And, as its name suggests, the whole point of the ESP exemption is to allow ESPs to provide *enhanced services* to their own customers without incurring access charges in the process.

But Level 3 and its supporters are not seeking to use LEC switching facilities to provide *enhanced services* to *their own customers*; they typically use broadband connections for that purpose (*e.g.*, cable modem service or DSL service). Rather, Level 3 and its supporters are seeking to use LEC switching facilities to deliver *plain old circuit-switched telephone calls* to *non-customers* who are called by their own subscribers.[26] Indeed, while an IP-PSTN call may originate as an IP-based information service over a broadband connection, it terminates as nothing more than a standard, circuit-switched voice telecommunications service on the PSTN -- in the exact same fashion as a traditional long distance telephone call -- and is therefore subject to access charges. And there is absolutely nothing in the Commission's discussions of the ESP

[23] SBC Opposition at 13-18.

[24] *See MTS and WATS Market Structure Order* ¶ 83.

[25] *Access Charge Reform*, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982 ¶ 343 (1997).

[26] *See* Level 3 Petition at 16-17.

exemption to suggest that the Commission ever contemplated, much less intended, the exemption to change this result.[27]

To be sure, the Commission has, on occasion used generalized, short-hand descriptions of the ESP exemption, which, if taken out of context, could be used (incorrectly) as fodder for an expansion of that exemption. SBC fully expects that Level 3 and some of its supporters will seize on these general statements in a misguided attempt to persuade the Commission that the ESP exemption is broad enough to relieve them of their obligations to pay access charges on the PSTN side of an IP-PSTN call.[28] But such an interpretation would be directly at odds with the Commission's own understanding of the exemption.[29] Construing the limited ESP exemption in the expansive manner suggested by Level 3 and its supporters would dramatically broaden the scope of that exemption and give IP-PSTN service providers a substantial cost advantage over non-IP-based providers at a time when the Commission has just recently stated that the compensation owed for sending traffic to the PSTN should *not* differ depending on "whether the traffic originates on the PSTN, on an IP network, or on a cable network."[30] Thus, despite some commenters' misguided attempts to invoke the ESP exemption for IP-PSTN traffic, the

[27] *See* SBC Opposition at 13-18.

[28] AT&T, for example, is particularly fond of quoting a passage from the *Intercarrier NPRM*, where the Commission stated that "Internet Protocol (IP) telephony threatens to erode access revenues for LECs because it is exempt from the access charges that traditional long-distance carriers must pay." AT&T Comments at 14 (quoting *Intercarrier NPRM* ¶ 133). But AT&T fails to acknowledge that this statement appears in the Initial Regulatory Flexibility Analysis (IRFA) section of the *NPRM* and is intended to provide a general summary of the reasons the Commission initiated the *NPRM*. In the substantive portions of the *NPRM*, however, the Commission sets forth a far more nuanced explanation of the ESP exemption when it states that "long distance calls *handled by ISPs* using IP telephony are *generally* exempt from access charges under the enhanced service provider (ESP) exemption." *Intercarrier NPRM* ¶ 6 (emphasis added). Thus, AT&T's reliance on the IRFA section for an expansion of the ESP exemption is misplaced.

[29] *See* SBC Opposition at 9-13.

[30] *IP-Enabled Services NPRM* ¶ 33.

exemption provides no basis whatsoever for evading the long-standing obligation to pay access charges on that traffic.

3. The *Report to Congress* Did Not -- and Lawfully Could Not -- Create an Exemption from Access Charges for IP-PSTN Traffic.

A handful of commenters claim that the Commission's 1998 *Report to Congress* "made clear" that access charges do not apply to "any form of IP telephony."[31] But as SBC has demonstrated at length in a separate proceeding addressing AT&T's access charge avoidance petition,[32] this claim blatantly mischaracterizes the text of the *Report to Congress*, which by its own terms did not alter the access charge rules in any way, and misapprehends the law, which prohibits the Commission from altering the access charge rules without adhering to well-established procedural requirements.[33]

a. The Text of the *Report to Congress* Did Not Alter the Commission's Access Charge Rules.

In the *Report to Congress*, the Commission identified various forms of "IP telephony" and observed that some appeared to have the characteristics of telecommunications services.[34] The Commission pointed out that "[t]he Act and the Commission's rules impose various requirements on providers of telecommunications, including… paying interstate access charges[.]"[35] The Commission went on to express concerns that future technological changes may blur distinctions between its tentative definitions of the various forms of IP telephony and

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[31] AT&T Comments at 13. *See also* ICG Comments at 8; USA Datanet Comments at 5.

[32] Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges, WC Docket 02-361 (Oct. 18, 2002).

[33] *See* Memorandum by SBC Communications, Inc., Urging the Commission to Deny AT&T's Access Charge Avoidance Petition, WC Docket Nos. 02-361, 03-211 & 03-266, January 14, 2004 (SBC Memorandum), attached as an exhibit to *Ex Parte* Letter from James Smith, SBC, to Michael Powell, FCC, WC Docket No. 02-361 (Jan. 14, 2004).

[34] *Report to Congress* ¶ 89.

[35] *Report to Congress* ¶ 91.

that determining the jurisdictional nature of IP telephony for access charge purposes may be challenging, both of which it would address in a future proceeding.[36]

Some commenters have focused on a particular phrase from the Commission's discussion in paragraph 91 of the *Report* ("we may find it reasonable that [IXCs] pay similar access charges") and have erroneously claimed that this phrase created an exemption from its access charge rules.[37] But there is nothing in this paragraph that suggests the Commission was doing anything other than identifying issues it might confront in future proceedings.[38] The Commission never says in paragraph 91 -- or anywhere else in the *Report* for that matter -- that it is creating an exemption from, or otherwise modifying, its access charge rules. To the contrary, it is abundantly clear that the *Report to Congress* did not decide or change *anything* because the Commission explicitly stated that it is not making "any definitive pronouncements" and would "defer a more definitive resolution of these issues" to a future proceeding with a more fully-developed record.[39] The Commission even observes that it would "need to carefully consider whether, pursuant to our authority under section 10 of the Act, to *forbear* from imposing any of the rules" that would otherwise apply.[40] It is therefore not surprising that Level 3 has, in fact, filed a petition for forbearance from the Commission's access charges rules, because those rules govern the compensation owed for access services provided on the PSTN side of an IP-PSTN call. And nowhere in the *Report to Congress* did the Commission ever remotely suggest that it was in any way altering its long-standing access charge rules.

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[36] *Report to Congress* ¶¶ 90, 91.

[37] *See, e.g.*, AT&T Comments at 13.

[38] The fact that the Commission speaks in the future tense when discussing the application of access charges to phone-to-phone IP telephony ("we may find it reasonable" that providers of phone-to-phone IP telephony pay similar access charges) is not, as some claim, evidence that access charges do not now apply. It simply reflects the fact that the Commission is referring to what it might decide in a *future proceeding*.

[39] *Report to Congress* ¶ 90.

[40] *Report to Congress* ¶ 92 (emphasis added).

b. As a Matter of Law, the Commission Could Not Have Altered Its Access Charge Rules in the *Report to Congress.*

Even if the text of the *Report to Congress* could be read to modify the Commission's access charge rules -- and it cannot -- the Commission could not, as a matter of law, have altered those rules. The Administrative Procedure Act (APA) requires that, when an agency adopts or changes a rule, notice of "either the terms or substance of the proposed rule or a description of the subjects and issues involved" must be published in the Federal Register.[41] But the bureau-level public notice that solicited comments in preparation for the *Report to Congress* did not mention access charges and did not give the slightest indication that the Commission intended to change any of its rules. Instead, the notice stated that Congress directed the Commission to "undertake a review" of the implementation of the universal service provisions of the 1996 Act and "submit a report" to Congress.[42]

Any attempt to alter the Commission's access charge rules based on the Bureau's notice would be unlawful, because, as the D.C. Circuit has made clear in an analogous situation, parties cannot "reasonably assume that the Commission would . . . undertake, as a result of the Bureau's Notice, consideration of more than" it proposed in that notice.[43] Thus, in light of this procedural omission, it would be reversible error for the Commission to determine that the *Report to Congress* modified its access charge rules in any way.

In addition, the APA and the Commission's own rules also mandate that any rule modifications be published in the Federal Register after they are adopted.[44] The *Report to*

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[41] 5 U.S.C. § 553(b).

[42] *Common Carrier Bureau Seeks Comment for Report to Congress on Universal Service Under the Telecommunications Act of 1996*, CC Docket No. 96-45, Public Notice, DA 98-2 (Jan. 5, 1998).

[43] *Sprint Corp. v. FCC*, 315 F.3d 369, 376 (D.C. Cir. 2003) (Holding that where the Common Carrier Bureau issued a public notice seeking comment on a petition for clarification of one of the Commission's rules, this was not sufficient notice "that the Commission was proposing to 'revise' its initial rule, much less that it would" adopt a policy "in any manner other than" the one suggested in the petition.).

[44] *See* 5 U.S.C. § 553(d); 47 C.F.R. § 1.427. *See also* 5 U.S.C § 552(a)(1)(D) (requiring publication in the Federal Register of all "interpretations of general applicability.").

Congress, however, was never published in the Federal Register.[45] Any attempt by the Commission to enforce the *Report to Congress's* purported modification of Rule 69.5 would be a clear violation of the APA and its own rules and would constitute reversible error.[46]

B. Level 3 Has Failed to Satisfy Any of the Statutory Criteria Required for Forbearance.

Under section 10 of the Communications Act, a party seeking forbearance from the enforcement of a provision of the Act or a Commission regulation is required to demonstrate *all* of the following: (1) enforcement is not necessary to ensure that charges, practices, and classifications are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement is not necessary for the protection of consumers; and (3) forbearance is consistent with the public interest.[47] Many of the commenters supporting Level 3's petition, however, have not even bothered to address the statutory forbearance criteria at all.[48]

By contrast, SBC and other commenters have explained in great detail not only why Level 3 fails the statutory test for forbearance but also why granting Level 3's petition would be affirmatively harmful to consumers and competitors alike. First, forbearance would result in unreasonable price discrimination between similarly situated users of ILEC access services and

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[45] The *Report to Congress* also does not contain ordering clauses or an appendix of revised rule sections, which further demonstrates that no rules were changed in that *Report*.

[46] In support of its access charge avoidance petition, AT&T claimed (erroneously) that the APA's notice and comment requirements do not apply because the *Report to Congress* announced an "interpretive" rule, which is not subject to those requirements. *Ex Parte* Letter from Pat Merrick, AT&T, to Marlene Dortch, FCC, WC Docket No. 02-361 (Feb. 20, 2004). As SBC explained at length, however, the *Report to Congress* could not qualify as an interpretive rule because: the interpretive rule exception to the APA requirements is narrow and only applies to clarifications or interpretations of existing rules; the *Report* specifically said the Commission was *not* making *any* definitive pronouncements -- interpretive or otherwise; and characterizing the *Report to Congress* as effectuating an exemption from the access charge rules would be a major substantive change, not a mere clarification or interpretation. *Ex Parte* Letter from Gary Phillips, SBC, to Marlene Dortch, FCC, WC Docket No. 02-361 (March 12, 2004).

[47] 47 U.S.C. § 160.

[48] *See* Global Crossing Comments; Information Technology Association of America Comments; MCI Comments; Pinpoint Comments; Progress and Freedom Foundation Comments; USA Datanet Comments.

would lead to unjust and unreasonable rates for those services.[49] Second, forbearance would harm consumers by jeopardizing the universal availability of affordable telecommunications service across the nation.[50] And third, forbearance would contravene the public interest by undermining fair and efficient competition in the communications marketplace.[51] In light of these substantial concerns, the Commission should deny Level 3's petition and instead move forward expeditiously with holistic intercarrier compensation reform.

C. Although Commenters Are Divided on the Merits of Level 3's Forbearance Petition, the Record Shows Substantial Agreement on Key Issues Regarding IP-PSTN Services.

While there is disagreement among commenters as to how the Commission should ultimately rule on Level 3's petition, there is significant agreement on some of the fundamental issues that the Commission will need to address regarding IP-PSTN services. SBC urges the Commission to take note of these areas of agreement and to be guided accordingly as it addresses the IP-related issues pending before it.

1. IP-PSTN Services Are Interstate and Should Be Subject to the Commission's Exclusive Jurisdiction.

As we stated in our comments and our recently filed petitions for a declaratory ruling and for forbearance, SBC believes that IP-PSTN services are interstate services and should be subject to the Commission's exclusive jurisdiction.[52] These services, which fall within a broader

[49] *See* America's Rural Consortium Comments at 7; BellSouth Comments at 16-17; ICORE Comments at 13; Independent Telephone and Telecommunications Alliance Comments at 3-4; Nebraska Rural Independent Companies Comments at 6-8; SBC Opposition at 20-24; Verizon Comments at 11-14.

[50] *See* America's Rural Consortium Comments at 7-8; California Comments at 3-5; ICORE Comments at 14-15; NTCA Comments at 3-4; Nebraska Rural Independent Companies Comments at 8-11; SBC Opposition at 24-27; Supra Comments at 6-8; Verizon Comments at 15-16.

[51] *See* America's Rural Consortium Comments at 8; BellSouth Comments at 13-14; GVNW Comments at 3-4; ICORE Comments at 9-10, 15-16; Independent Telephone and Telecommunications Alliance Comments at 4; NTCA Comments at 4; SBC Opposition at 27-30; Sprint Comments at 5; Verizon Comments at 16-19.

[52] *See* Petition of SBC Communications Inc. For a Declaratory Ruling Regarding IP Platform Services, WC Docket No. 04-__ (Feb. 5, 2004) (SBC IP Platform Services Petition for Declaratory Ruling);

category of "IP platform services" described in SBC's petitions, provide customers with the capability to interact with multiple information sources during the course of a single communication, most of which are likely to be located outside the calling party's state.[53] We therefore urged the Commission to conclude that, IP-PSTN services, like the Internet itself, are inherently interstate.[54]

Several commenters share the view that IP-PSTN services are interstate in nature. AT&T, for example, argues that IP-PSTN traffic "is jurisdictionally interstate, and the Commission should move quickly to ensure that federal policy toward interstate IP-based services is not undermined" because "varying state regulations could quickly balkanize IP-PSTN services . . . ."[55] Verizon asserts that "there is no simple way to determine the location of the IP caller," and thus the IP end of a Level 3 VoIP call "could literally be anywhere in the world," rendering Level 3's VoIP services "jurisdictionally interstate in nature."[56] And Global Crossing urges the Commission to "explicitly rule that the classification of IP Telephony is within its exclusive jurisdiction and thus subject to federal preemption" in order "to ensure that national policies regarding interstate IP Telephony are not frustrated by a patchwork of conflicting State decisions that could have the effect of undermining continued growth and innovation in IP Telephony services across the nation."[57]

Petition of SBC Communications Inc. for Forbearance from Application of Title II Common Carrier Regulation to IP Platform Services, WC Docket No 04-29 (Feb. 5, 2004) (SBC IP Platform Services Petition for Forbearance).

[53] SBC IP Platform Services Petition for Declaratory Ruling at 23-33.

[54] SBC Opposition at 5, 30. *See also* SBC IP Platform Services Petition for Declaratory Ruling at 34-41.

[55] AT&T Comments at 9.

[56] Verizon Comments at 4-5. *See also* Broadwing Comments at 6.

[57] Global Crossing Comments at 6-7.

2. Access Charge Issues Related to IP-PSTN Traffic Should be Addressed Holistically in the Commission's *Intercarrier NPRM*.

In our comments, SBC explained that the Commission has historically chosen not to alter its access charge rules in an isolated, piecemeal fashion.[58] Rather, the Commission has wisely taken a holistic approach to access charge and universal service reform by addressing access charges, universal service support and end-user rates in a comprehensive and carefully calibrated fashion. By doing so, the Commission has made substantial progress in removing implicit support from interstate access charges, creating explicit universal service support mechanisms to replace implicit interstate subsidies, and introducing competition to the marketplace, while simultaneously lifting telephone subscription rates to their highest levels ever. Thus, SBC urged the Commission not to upset the delicate balance achieved through these reform efforts by granting Level 3's petition. Instead, we encouraged the Commission to continue its comprehensive approach to access charge and universal service reform by moving ahead expeditiously with a holistic approach to intercarrier compensation reform.[59]

A variety of commenters support this position and have asked the Commission to maintain its holistic approach to access charge and universal service reform. According to BellSouth, "[t]he Commission should devote its resources to establishing a fair and uniform intercarrier compensation mechanism for all carriers within the next twelve to fifteen months . . ."[60] And as Supra points out, the "proper forum" for Level 3's request is the *Intercarrier NPRM* because that proceeding puts the Commission in "the best position to address reducing switched

[58] SBC Opposition at 4-7.

[59] By contrast, where the Commission is called upon to clarify or interpret its existing rules (rather than eliminate or modify those rules), the Commission should move as expeditiously as possible to provide the requested guidance, particularly when necessary to shut down regulatory arbitrage that is squarely at odds with the need for a holistic approach to access charge and universal service reform. *See Ex Parte* Letter from James Smith, SBC, to Michael Powell, FCC, WC Docket No. 02-361 (Jan. 14, 2004) (urging the Commission to rule expeditiously on AT&T's access avoidance petition).

[60] BellSouth Comments at 20.

access revenues and rate rebalancing to ensure the preservation of universal service . . . ."[61] America's Rural Consortium urges the Commission not to address Level 3's petition "on a piecemeal basis" or "in a vacuum" and instead suggests that the Commission consolidate its consideration of that petition with the *IP-Enabled Services NPRM* or the *Intercarrier NPRM*.[62] Even MCI, who supports Level 3's petition, recognizes that the access charge regime "ought to be completely overhauled" and observes that the Commission "is considering the right questions" in the *Intercarrier NRPM.*[63]

D. While SBC Opposes Level 3's Forbearance Request, SBC Supports A Minimally Regulated Environment for IP-Based Services.

As SBC explained in its recently filed IP platform services petitions, we believe the Commission should create a broadly defined and minimally regulated environment where these services can flourish. Specifically, we urged the Commission to declare that IP platform services are interstate information services subject to the Commission's Title I authority, which the Commission may use to craft any regulations necessary to implement important public policy goals, such as universal service, public safety (911), disability access, and communications assistance for law enforcement.[64] And to eliminate any doubt concerning the unregulated status of IP platform services, the Commission should expressly forbear from applying Title II regulation to the extent that such regulation might otherwise theoretically apply.[65] By doing so, the Commission can ensure that IP platform services will be permitted to thrive in a "vibrant and competitive free market . . . unfettered by Federal or State regulation."[66] In furtherance of this

[61] Supra Comments at 8.

[62] America's Rural Consortium Comments at 9. *See also* California Comments at 2; Rural Companies Comments at 12.

[63] MCI Comments at 6.

[64] SBC IP Platform Services Petition for Declaratory Ruling at 34-42.

[65] SBC IP Platform Services Petition for Forbearance at 2-4.

[66] *See* 47 U.S.C. § 230(b)(2).

goal, SBC remains committed to working with the Commission, the communications industry, and other stakeholders to reform the Commission's intercarrier compensation regime and to develop an appropriate regulatory framework for IP platform services.

IV. CONCLUSION

For the forgoing reasons, the Commission should deny Level 3's petition for forbearance.

Respectfully Submitted,

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